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No. 506

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1963

FRANK ADAMS & CO., ET AL,
Appellants,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees,

and

BALTIMORE & OHIO RAILROAD CO., ET AL,
Intervening Defendants.

PETITION FOR REHEARING

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PETITION FOR REHEARING

STATEMENT

Pursuant to Rule 58 of the Revised Rules of the Supreme Court of the United States, Appellants pray that this Court grant a rehearing of its judgment of December 9, 1963, — U.S. —, 11 L. Ed. 2d 269, 32 U.S. Law Week 3209, affirming the motions of the Appellees and Intervening Defendants, and affirming the judgment of the United States District Court for the Southern District of Ohio, Western Division.

Appellants pray that upon consideration hereof, this Court will grant plenary review and order a full hearing on the merits with the filing of briefs and oral arguments.

REASONS FOR GRANTING REHEARING AND ORDERING PLENARY REVIEW

1. The Effect Of Rule 15 On Appellants' Statutory Right Of Appeal

Appellants submit that the summary affirmance of the decision below and the refusal to grant jurisdiction by this Court denies due process of law. By statute (28 U.S.C. §§ 1253, 2101, 49 U.S.C. § 45), Appellants have a right of appeal to this Court encompassing full briefing, oral argument and review of the record adversus summary consideration and disposition on the jurisdictional statement.

The reasoning of Appellants' argument is provided in Mr. Justice Douglas's dissent in *Lineham* v. *Waterfront Commission*, 347 U.S. 439:

> "This case illustrates what I fear is a growing practice of the court of diluting the Act of Congress which gives us jurisdiction of appeals. 28 U.S.C. § 1253, et al. The Congress carved out a group of cases, of which this is one, that comes here of right and is not dependent, as are petitions for certiorari, on a vote of four Justices out of nine for an adjudication by the Court on the merits of the controversy. In recent years the Court has more and more dismissed or affirmed appeals, with no opportunity of counsel to make oral argument and without any opinion by the Court."

Moreover, appeal to the Supreme Court in this case is mandatory, there being no permissive alternate appeal to the Circuit Court of Appeals:

> ". . . appeal from the final judgment of the District Court will lie *only* to the Supreme Court." (Italics added) 49 U.S.C. § 45.

Surely, Congress in limiting appeals to the Supreme Court in cases of this magnitude did not envision the disposal of such appeals by mere review of the jurisdictional statement.

This Court's Rule 15 pertaining to jurisdictional statements requires Appellants to set forth therein:

> ". . . the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution."

The concept of Rule 15 applied to obligatory appeals makes substantially indistinguishable considerations of petitions for *certiorari* and statutory appeals. It is true that Section 1253 does not make mandatory plenary consideration; nevertheless, statutory appeals in order to provide due process must afford not just the opportunity to present a limited statement supporting jurisdiction, but an opportunity to have the record before the Court with oral argument and full briefs directing the errors of the Court below to this Court. Due process of law is no less a package of rights and privileges in the highest Court than it would be in a lower court. What is singularly consistent in this case is that from the Examiner's hearing up through the jurisdictional statement filed in this case, more attention has been paid to avoiding due process than providing it.

It is beyond dispute that a court, as well as a legislative body or an executive, may deny due process or work undue process of law. There can be no constitutional dispute as to the power of Congress to establish the right of appeal it has done by 28 U.S.C. § 1253 and 49 U.S.C. § 45. Congress has not empowered this Court to limit in any way this unqualified right by its own rules or otherwise. There is no perceivable constitutional basis, therefore, for the failure of this Court to accord Appellants such as here presented the full measure of their rights vested in them by Congress. The summary disposition of this appeal can be nothing less here than a deprivation by this Court of Appellants' constitutionally valid statutory right to due process of law in obtaining full and plenary consideration of their appeal. Anything short thereof deprives Appellants of what Congress has enacted they are entitled to obtain. In this respect, Rule 15 forges further links in the chain of denial of due process.

2. The Court Below Misapplied Rule 43(b) And The Doctrine Of Privilege

The three-judge Court's *per curiam* affirming the Commission's determination categorically and patently perpetuates erroneously serious errors by the Examiner which denied Appellants due process of law. A particular part of the holding of the lower Court complained of is as follows:

> "Plaintiffs have complained at length that they were denied a fair hearing and due process of law by reason of the limitation placed on their cross-examination of certain witnesses by the Commission. However, a thorough review of the record in this case wherein the burden of showing impropriety in the Commission's conclusion is upon the plaintiffs, considered in the light of plaintiff's arguments, does not bear this out.

> *The plaintiffs did not see fit to recall the witnesses in question on direct examination as their own witnesses and make proffers.*" (Italics supplied)

The Court thus applied the corollary of the last phrase of Rule 43 (b), Federal Rules of Civil Procedure, to the procedure followed by the Examiner. That phrase reads as follows:

> "* * * and may be cross-examined by the adverse party only upon the subject matter of his examination."

At civil trials in the United States courts pursuant to the Federal Rules of Civil Procedure, a party desiring the testimony of a witness produced by an adverse party beyond the scope of the original examination in chief must call the witness as his own for a second examination in chief.

What Appellants were confronted with before the Examiner presented a twofold dilemma. First, did Rule 43 (b) and its sequel of Appellants calling the witnesses as their own after the Examiner barred their cross-examination, properly apply to that Interstate Commerce Commission hearing? Secondly, what could have been accomplished by Appellants recalling the recalcitrant witnesses as their own after their cross-examination had been barred upon the grounds of privilege?

Section 12, Title 49, United States Code, statutorily impels the attendance and testimony of witnesses and the production of documents in evidence at a hearing such as was had here. By sub-section (5) *ibid*, witnesses are to "be carefully examined", which implies nothing less than full and complete examination. A full and complete hearing is envisaged by the statute. *United States* v. *Northern Pacific R. Co.*, 288 U.S. 490; *Atchison, Topeka & Santa Fe R. Co.* v. *United States*, 284 U.S. 248; *Georgia Public Service Commission* v. *United States*, 283 U.S. 765; *Interstate*

Commerce Commission v. *Louisville & Nashville R. Co.*, 227 U.S. 88; *United States* v. *Illinois Central R. Co.*, 291 U.S. 457. These holdings postulate that all parties should be given ample opportunity to show fairly, both by evidence and argument, whether the action sought to be had is proper or not by the standards of justice and law. *New England Divisions Case*, 261 U.S. 184. Though the Commission has wide discretion in formulating appropriate solutions solving a technical and complex matter before it, a procedure followed by it should be *fairly* adapted to the unique circumstances of the particular case. *Secretary of Agriculture* v. *United States*, 347 U.S. 645. But further, in exercise of its discretion, it has never been statutorily provided nor judicially held that the Federal Rules of Civil Procedure, notably Rule 43 (b), apply or are binding upon the Commission.

> "The commission is an administrative body and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties." *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U.S. 88 at p. 93.

See also *Interstate Commerce Commission* v. *Baird*, 194 U.S. 25; *Spiller* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 253 U.S. 117.

This Court "* * * must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U.S. 499, 511. The situation here is not as reviewed by the Court in *Swift & Co.* v. *United States*, 343 U.S. 373. Therein, there was patently a complete record and no exclusion of critical testimony. The corollary thereto is necessarily that it is not the duty of the courts to sustain the Commission when there is not a com-

plete record, but to take the opposite action. On this score, dissimilarity of this case with *Ellis* v. *Interstate Commerce Commission*, 237 U.S. 434, has to be emphasized. Here the witnesses whose cross-examination was barred were not before the Commission as *strangers* into whose affairs the Examiner barred inquiry. These witnesses were for intervening defendants, who were actual parties to the case adverse to complainants-appellants. There are thus narrow but most vital and fundamental questions of due process upon which pivot the *per curia* below and here.

We find no precedent supporting in general, in administrative hearings or court trials between private parties, the premise that denial of cross-examination *per se* constitutes due process. If such denial here be based upon the last phrase of Rule 43(b), then it has to be conceded that even if the rule were a permissive guide to the Examiner and not mandatorily incumbent upon him to follow, the cross-examination sought was directly "upon the subject matter" of the examination in chief. *Ibid.* Thus (a) under the general rules of fairness in hearing and completeness of the record indicated to be necessary by this Court's decisions above cited for there to be due process, or (b) on the strict technicalities of Rule 43(b), the record is not complete. All of the evidence was prevented from being presented by the barring of the cross-examination. There was thereby an abuse of discretion and power of the Examiner. See *Manufacturers Ry. Co.* v. *United States*, 246 U.S. 457.

> "• • • the purposes of the act call for a *full inquiry* by the Commission into all the circumstances and conditions pertinent to the questions involved." (Italics provided). *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U.S. 184, 196.

Without a complete record before this Court, there can be no basis for its own *per curiam* to constitute due process for there is no way for this Court to know, in the absence of a complete record, what the decision means. *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co., supra.*

A mystifying sentence from the *per curiam a qua* is as follows:

> "In any event, the areas of inquiry which were closed to plaintiffs by the restrictions complained of could not have produced evidence inconsistent with the Commission's determinations."

With what particular kind or power of juridical crystal ball the three-judge Court was equipped in which it viewed the cross-examination not made is not known to Appellants nor disclosed by the record. We are aware of no judicial process, procedure or method by which testimony *not taken* can be judicially considered and weighed and such a fact conclusion be reached thereon. The quoted statement by the lower Court is in itself erroneous and deprives Appellants of due process. The complexity of the record before the Commission should not have mandated an affirmance by the Court below particularly since error dictated a remand.

> "Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. *West Ohio Gas Co.* v. *Public Utilities Comm'n (No. 1)*, supra, p. 70; *West Ohio Gas Co.* v. *Public Utilities Comm'n (No. 2)*, 294 U.S. 79; *Los Angeles Gas & Electric Corp.* v. *Railroad Commission*, 289 U.S. 287, 304. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is

> the need, when power has been bestowed so freely, that the 'inexorable safeguard' (*St. Joseph Stockyards Co.* v. *United States*, 298 U.S. 38, 73) of a fair and open hearing be maintained in its integrity. *Morgan* v. *United States*, 298 U.S. 468, 480, 481; *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, supra. The right to such a hearing is one of 'the rudiments of fair play' (*Chicago, M. & St. P. Ry. Co.* v. *Polt*, 232 U.S. 165, 168) assured to every litigant by the Fourteenth Amendment as a minimal requirement. *West Ohio Gas Co.* v. *Public Utilities Comm'n (No. 1)*, *(No. 2)*, supra; *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, 682. Cf. *Norwegian Nitrogen Co.* v. *United States*, supra. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." *Ohio Bell Tel. Co.* v. *Public Utilities Commission of Ohio*, 301 U.S. 292, 304.

But the Court *a qua* may have, and probably did, completely misinterpret the record in concluding it to be necessary (a) to reach into the technicalities of Rule 43(b), and (b) to formulate a fact conclusion upon testimony not allowed to be taken, as bases for affirming the Commission. It has to be re-emphasized that the Examiner barred the cross-examination because the evidence thus sought to be elicited was confidential information. The latter phrase can be no more than a synonym for "privilege", which has definite and restrictive meaning in the law. The three-judge Court completely ignored the invalidity on the face of the record of the granting of a plea of privilege by the Examiner. Due process is denied, therefore, on three scores: the original error of the Examiner in barring cross-examination completely, his error in not holding that privilege (if any) was waived, and the failure of the lower Court to consider and reverse those errors of the Examiner.

Exactly what species of privilege the Examiner protected is not shown clearly by the record. It is certainly not, however, the purely personal privilege of an individual against self-incrimination not available to a corporation. See *United States* v. *White*, 322 U.S. 694, and prior decisions cited at 322 U.S. 699. Cf. particularly *Wilson* v. *United States*, 221 U.S. 361. None of the witnesses were attorneys, so that the attorney-client privilege could not be involved (*Radiant Burners, Inc.* v. *American Gas Association*, (C.A. 7, June 28, 1963), 320 F. 2d 314, reversing 207 F. Supp. 771), nor was the information sought an attorney's work product (*Hickman* v. *Taylor*, 329 U.S. 495). There is no possibility of there being involved the privilege of a physician or minister of religion.

All that remains is business secrecy. This is not a generally recognized privilege in controversies such as that here presented. At any event, even business secrecy to be accorded a status of privilege has to encompass all of four generally accepted fundamental conditions necessary

> "* * *to the establishment of a privilege against the disclosure of communications:
>
> (1) The communication must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which, in the opinion of the community ought to be sedulously *fostered*.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.
>
> Only if these four conditions are present should a privilege be recognized." 8 *Wigmore, Evidence* § 2285 (McNaughton Rev. 1961).

If any of these criteria are present, certainly the fourth is not, and the privilege was erroneously granted by the Examiner and erroneously perpetuated by the Court *a qua*.

Most privileges are statutory. It is universally the rule, though, that even as to a statutory privilege of a most sanctified nature, e.g., the physician-patient privilege, such may be waived by the voluntary testimony on the subject matter of the beneficiary of the privilege. This opens the door not only to his own cross-examination but also to examination of the witness otherwise barred by privilege. See 58 Am. Jur. 253, "Witnesses" § 447. Thus, here, the door was opened by the voluntary appearance of the witnesses either personally or by sworn statements. To deny cross-examination on the subject matter of the appearance of those witnesses in chief was to commit error; also had there been privilege, the Examiner erred in not ruling it was waived. These errors, the three-judge Court perpetuated.

Thus, what is tantamount to a whole industry has been denied due process of law by an administrative body, perpetuated and multiplied by a statutory three-judge Court, which, if allowed to stand, will destroy the industry. At the very least, these manifest errors justified at least a *per curiam* here remanding the case for a complete hearing by the Commission rather than the converse.

Respectfully submitted,

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Dated: January 17, 1964

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

.....

Counsel for Appellants

PROOF OF SERVICE

I, David Reichert, one of the attorneys for the Appellants herein and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, and also upon the Solicitor General, Department of Justice, Washington 25, D.C., by mailing a copy thereof, properly addressed to said parties, with air mail postage where required and first-class postage where permitted, prepaid.

Dated at Cincinnati, Ohio, this 17th day of January, 1964.

.....

David Reichert